

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of )  
 )  
CASTLE & COOKE RESORTS, LLC, )  
LANAI HOLDINGS, INC., AND )  
LANAI WATER COMPANY, INC. )  
 )  
For Declaratory Ruling. )  
\_\_\_\_\_ )

DOCKET NO. 2007-0232

DECISION AND ORDER NO. 23687

DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

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Commission, State of Hawaii.

Karen Higashi

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of	)	
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CASTLE & COOKE RESORTS, LLC,	)	Docket No. 2007-0232
LANAI HOLDINGS, INC., AND	)	
LANAI WATER COMPANY, INC.	)	Decision and Order No. 23687
	)	
For Declaratory Ruling.	)	
	)	

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DECISION AND ORDER

By this Decision and Order, the commission declares that the proposed transfer of ownership and provision of non-potable water by LANAI HOLDINGS, INC. ("Lanai Holdings") to CASTLE & COOKE RESORTS, LLC ("Castle & Cooke") and LANAI WATER COMPANY, INC. ("Lanai Water"), as presented in the Petitioners'<sup>1</sup> "first proposal" in their Petition,<sup>2</sup> discussed further herein, would not render Lanai Holdings a public utility under HRS § 269-1. Accordingly, Lanai Holdings is not required to obtain a commission-issued certificate of public convenience and necessity ("CPCN") under HRS § 269-7.5 to provide the proposed water service described by Petitioners.

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<sup>1</sup>Lanai Holdings, Castle & Cooke, and Lanai Water are collectively referred to herein as the "Petitioners."

<sup>2</sup>See Petition for Declaratory Ruling, Verification, Memorandum in Support of Petition, and Certificate of Service, filed on August 15, 2007 ("Petition"). Petitioners served copies of the Petition on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex-officio party to all proceedings before the commission. See Hawaii Revised Statutes ("HRS") § 269-51; Hawaii Administrative Rules ("HAR") § 6-61-62.

I.

Background

A.

The Petition

On August 15, 2007, Petitioners filed the Petition, in which Petitioners proposed two alternative transactions for the restructuring of ownership in certain non-potable water facilities currently owned by Lanai Holdings. Petitioners requested that the commission "[i]ssue a declaratory order setting forth that Lanai Holdings would not be [a] public utility within the meaning of HRS § 269-1 under the first proposal, or in the alternative, neither Castle & Cooke, nor Lanai Holdings would be public utilities within the meaning of HRS § 269-1 under the second proposal[.]"<sup>3</sup>

As described in the Petition, Castle & Cooke owns and operates various hotel and resort operations on the island of Lanai, including "The Challenge at Manele" ("CAM") golf course located in the Manele Bay resort area.

Lanai Holdings, a wholly-owned subsidiary of Castle & Cooke, owns and operates wells and related pumps on the island of Lanai that produce drinking (i.e., potable) and brackish irrigation (i.e., non-potable) water. In addition to owning the non-potable wells and related pumps ("Non-Potable Wells"), Lanai Holdings owns the non-potable water storage, transmission, and distribution systems ("Non-Potable Water Facilities"). Lanai Holdings currently provides non-potable water to its parent

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<sup>3</sup>Petition at 9.

company, Castle & Cooke, for irrigation purposes, principally for irrigation of the CAM golf course. Lanai Holdings also provides its subsidiary, Lanai Water, with potable and non-potable water through an exclusive agreement for the sale of water. Petitioners represent that Lanai Holdings is not a public utility, and it does not provide water to the general public or to any limited class or portion of the general public. Lanai Holdings owns all of the stock of Lanai Water.

Petitioners state that Lanai Water is a public utility within the meaning of HRS § 269-1 that provides potable water to the general public on Lanai through its potable water pumps, transmission, and distribution system.<sup>4</sup> All of Lanai Water's potable water is received from Lanai Holdings under the exclusive water agreement mentioned above.

Petitioners explain that the Petition arises out of their desire for Lanai Water to provide, in addition to potable water, non-potable water service to the general public. Lanai Water essentially intends to provide non-potable water service to the general public by utilizing the same water source and certain facilities that are currently used by Lanai Holdings to provide non-potable water to Castle & Cooke. Petitioners acknowledge that Lanai Water will need to obtain approval from the commission for authorization to provide non-potable water service. In addition, Petitioners seek assurance, via the Petition, that Lanai Water's provision of non-potable water

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<sup>4</sup>Lanai Water was granted a CPCN to provide water distribution services on the island of Lanai in Decision and Order No. 9791, filed on June 13, 1988, in Docket No. 5972.

service would not jeopardize Lanai Holdings' current ability to provide irrigation water to Castle & Cooke. Thus, Petitioners request that the commission consider two proposed transactions for the restructuring of ownership in certain Non-Potable Water Facilities. Petitioners state that, if the commission agrees with Petitioners in the determination of the first proposal, then the second proposal need not be addressed by the commission.<sup>5</sup>

In the first proposal, Lanai Holdings would transfer an undivided interest in its Non-Potable Water Facilities to Lanai Water such that the Non-Potable Water Facilities would be jointly owned by Lanai Holdings and Lanai Water. Lanai Holdings would continue to provide non-potable water to Castle & Cooke for irrigation (principally to the CAM golf course), and would continue to sell bulk water to Lanai Water. Prior to providing non-potable water service to the general public, Lanai Water would seek an expansion of its operating authority from the commission.

Under the second proposal, Petitioners would enter into a transfer, resulting in the following: (1) Castle & Cooke and Lanai Holdings would share an undivided interest as tenants in common in the Non-Potable Wells; and (2) Castle & Cooke and Lanai Water would share an undivided interest as tenants in common in the Non-Potable Water Facilities. Under this proposal, Castle & Cooke would provide non-potable water to itself for irrigation purposes and Lanai Holdings would continue to sell bulk water to Lanai Water under the exclusive water agreement.

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<sup>5</sup>See Petition at 6.

As under the first proposal, Lanai Water would seek an expansion of its operating authority from the commission to provide non-potable water service to the general public.

Petitioners contend that, under the first proposal, Lanai Holdings would not be a public utility under HRS § 269-1, since Lanai Holdings would not be providing non-potable water service to the general public. According to Petitioners, Lanai Holdings' bulk sale of non-potable water to Lanai Water would be a sale to a wholly-owned entity, and Lanai Holdings' provision of non-potable water to Castle & Cooke would be to Lanai Holdings' sole owner and controlling company. Petitioners therefore state that, under both cases, Lanai Holdings would be providing water to itself. In addition, Petitioners maintain that the bulk sale of water to Lanai Water is not equivalent to a sale of non-potable water to the general public.

Moreover, Petitioners contend that, under the second proposal, Castle & Cooke and Lanai Holdings would not be public utilities under HRS § 269-1, since neither Castle & Cooke nor Lanai Holdings would be providing non-potable water service to the general public, nor to any class or limited portion of the general public; instead, Castle & Cooke would be providing non-potable water only to itself, and Lanai Holdings would be providing non-potable water to itself through its wholly-owned affiliate.

B.

Consumer Advocate's Position

On September 6, 2007, the Consumer Advocate filed its Statement of Position ("CA's Statement of Position"). The Consumer Advocate initially noted that, in most of the commission's past proceedings wherein a petitioner sought a declaratory ruling as to whether the services it provided would be found to be a public utility service, the facilities used to provide the services were owned by a single entity and the petitioner did not offer services to the general public. According to the Consumer Advocate, a distinction arises in this docket because the facilities used to provide potable and non-potable water to Castle & Cooke will be the very same facilities used to deliver potable and non-potable water to the general public. Thus, the Consumer Advocate stated: "Given the language in HRS § 269-1, one might conclude that either Castle & Cooke or Lanai Holdings is a public utility since they are the owner and/or operator of the facilities, that in part are used to provide service to the general public."<sup>6</sup>

However, the Consumer Advocate ultimately concluded, based on the commission's decision in In re Poipu Wastewater Corporation,<sup>7</sup> discussed further below, that:

neither Castle & Cooke nor Lanai Holdings should be found to be public utilities when the first transaction is executed. Since neither Castle & Cooke nor Lanai Holdings will be holding itself out,

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<sup>6</sup>CA's Statement of Position at 6.

<sup>7</sup>In re Poipu Wastewater Corp., Docket No. 7265, Decision and Order No. 16079, filed on November 14, 1997 ("Poipu Wastewater").

expressly or impliedly, as providing utility services to the general public, neither entity should be deemed to be a public utility under the definitions set forth in HRS § 269-1.<sup>8</sup>

The Consumer Advocate then stated that, if the commission agrees that Petitioners' proposed first transaction would not result in a finding that either Castle & Cooke or Lanai Holdings is a public utility, a commission determination on the second transaction is not required.

## II.

### Discussion

Under HRS § 269-7.5, a public utility, as defined in HRS § 269-1, must obtain a CPCN from the commission prior to commencing its business. HRS § 269-1 defines a "public utility" as:

every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telecommunications messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air within the State, or between points within the State, or for the production, conveyance, transmission, delivery, or furnishing of light . . . water, gas, or oil, . . .

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<sup>8</sup>CA's Statement of Position at 7. In addition, the Consumer Advocate initially recommended that Lanai Holdings be required to be a party in all future proceedings involving Lanai Water and the common facilities used to serve Lanai Water's customers. On September 18, 2007, Petitioners responded to this recommendation by the Consumer Advocate, and on September 24, 2007, the Consumer Advocate withdrew the recommendation. The commission accordingly makes no determination on this issue in this Decision and Order.



HRS § 269-1 (emphasis added).

The Hawaii Supreme Court clarified the definition of a public utility in In re Wind Power Pacific Investors-III, 67 Haw. 342, 686 P.2d 831 (1984) ("Wind Power"), by adopting the following test:

Whether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily dependent on the facts of the particular case, and the owner or person in control of property becomes a public utility only when and to the extent that his business and property are devoted to a public use. The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

Id. at 345, 686 P.2d at 834 (quoting 73B C.J.S. Public Utilities § 3).

In addition, in In re Poipu Kai Water Reclamation Corporation,<sup>9</sup> the commission examined the control of a facility as another critical factor in the test for whether an entity meets the definition of a "public utility" under HRS § 269-1. In Poipu Kai, the commission found that a private wastewater company is not a public utility with respect to services that it provides to persons who control the sole shareholder of the company. The commission reasoned under the facts of that case

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<sup>9</sup>In re Poipu Kai Water Reclamation Corp., Docket No. 6939, Decision and Order No. 11184, filed on July 22, 1991 ("Poipu Kai").

that the company "services itself, and not the general public or any portion of it."<sup>10</sup>

Subsequently, in Poipu Wastewater, cited by Petitioners and the Consumer Advocate, the commission held that two of three owners in a water reclamation facility were not public utilities, as each of the two owners provided water treatment service only to an entity or entities it owned:

Standing alone, neither CTF [(Hotel Sewage Treatment Corporation)] nor OHC [(Obayashi Hawaii Corporation)] is a public utility within the meaning of Hawaii Revised Statutes, section 269-1. Each provides water treatment services only to an entity or entities that it owns. CTF provides service only to Waiohai Resort and Poipu Beach Hotel, which CTF owns; and OHC services only the Sheraton Kauai Hotel, which OHC owns. Neither owns any part of the Poipu water reclamation facility for "public use." PWC [(Poipu Wastewater Corporation)] is the only party that provides service to the public. Thus, standing alone, neither CTF nor OHC is subject to our regulation. However, PWC is a public utility and subject to our jurisdiction.

Poipu Wastewater at 7 (emphasis added).

Consistent with Wind Power, Poipu Kai, and Poipu Wastewater, the commission, in In re Hokuli'a Community Services, Inc.<sup>11</sup> determined that a nonprofit corporation that owns and operates a water system and reclamation facility for the sole use of its members that control the corporation is not a public utility since the owner-customers of the corporation have the

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<sup>10</sup>See Poipu Kai at 5.

<sup>11</sup>In re Hokuli'a Cmty. Servs., Inc., Docket No. 00-0009, Decision and Order No. 17557, filed on February 22, 2000 ("Hokuli'a").

same control over the corporation as was demonstrated in Poipu Kai.<sup>12</sup>

Here, Petitioners propose, in the first scenario, that Lanai Holdings would transfer an undivided interest in the Non-Potable Water Facilities to Lanai Water (such that the Non-Potable Water Facilities would be jointly owned by Lanai Holdings and Lanai Water), and Lanai Holdings would continue to provide non-potable water to its parent, Castle & Cooke, for irrigation purposes, and sell bulk water to its wholly-owned subsidiary, Lanai Water, under a water agreement.

The commission finds, based on the facts presented by Petitioners, that the foregoing transaction would not render Lanai Holdings a "public utility" within the meaning of HRS § 269-1.<sup>13</sup> As maintained by Petitioners and the Consumer Advocate, Lanai Holdings would not be holding itself out, expressly or impliedly, to the general public as a non-potable water provider. Rather, Lanai Holdings would essentially be serving itself, since it will be providing water to its parent, Castle & Cooke, and its wholly-owned subsidiary, Lanai Water, through a water sales agreement. In the same vein, there is no basis to deem Lanai Holdings a public utility under the "control" test discussed in Poipu Kai and Hokuli'a since, according to Petitioners, Castle & Cooke has control and

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<sup>12</sup>Hokuli'a at 4-5.

<sup>13</sup>The commission finds, as also found by the Consumer Advocate, that Castle & Cooke would not be a "public utility" under HRS § 269-1 in Petitioners' first proposed transaction, for the same legal basis discussed above relating to Lanai Holdings.

oversight over the board and officers of Lanai Holdings, the decisions made by Lanai Holdings, and the right to provide input with respect to the non-potable water to be provided by Lanai Holdings.

Accordingly, pursuant to Wind Power, Poipu Kai, Poipu Wastewater, and Hokuli'a, the commission concludes that Lanai Holdings, under the particular facts of Petitioners' first proposed transaction, would not be a public utility under HRS § 269-1.<sup>14</sup> Thus, Lanai Holdings would not be required to obtain a CPCN under HRS § 269-7.5 to provide the proposed water service contemplated by Petitioners' first proposed transaction. Because the commission concludes that Lanai Holdings would not be a public utility under HRS § 269-1 under Petitioners' first proposal, it does not consider Petitioners' second proposal.

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. The commission declares that Petitioners' proposed transfer of ownership and provision of non-potable water by Lanai Holdings to Castle & Cooke and Lanai Water, as presented in Petitioners' first proposed transaction in their Petition, would

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<sup>14</sup>The commission's decision herein is limited to the facts of Petitioners' first proposed transaction and the issue presented to the commission. The commission makes no declaratory ruling in the scenario involving Lanai Holdings' present ownership of the Non-Potable Water Facilities; nor does the commission by this Decision and Order address any issue involving Lanai Holdings' sale of non-potable water to Castle & Cooke for rate-making purposes.

not render Lanai Holdings a public utility under HRS § 269-1. Accordingly, Lanai Holdings is not required to obtain a CPCN to provide the proposed water service described by Petitioners.<sup>16</sup>

2. This docket is closed unless otherwise ordered by the commission.

DONE at Honolulu, Hawaii SEP 28 2007.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairperson

By John E. Cole  
John E. Cole, Commissioner

By Leslie H. Kondo  
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

Kaiulani Kidani Shinsato  
Kaiulani Kidani Shinsato  
Commission Counsel

2007-0232.eh

<sup>16</sup>Given this determination by the commission on Petitioners' first proposal, the commission does not decide Petitioners' second proposal.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23687 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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Karen Higashi

DATED: SEP 28 2007